



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 12, 2003

Ms. Rita H. Atzmon  
Gostomski & Hecker, P.C.  
607 Urban Loop  
San Antonio, Texas 78204-3117

OR2003-8986

Dear Ms. Atzmon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192633.

The Bexar Medina Atascosa Water Control and Improvement District No. 1 (the "district"), which you represent, received a request for (1) plats and deeds attached to a named individual's letter to the Texas Natural Resource Conservation Commission ("TNRCC"), now known as the Texas Commission on Environmental Quality ("TCEQ"); (2) "plats, deed[s], maps or other records that show or identify which tracts below level 1084 [the district] claims it has an ownership or easement interest in"; and (3) any response to the named individual's letter or other communications with the TNRCC relating to the subject matter of the letter. You inform us that the district has no information that is responsive to part 3 of the request.<sup>1</sup> You also inform us that the district has released all of the information that is responsive to part 1 of the request and some of the information that is responsive to part 2. You claim that the rest of the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you raise and have reviewed the information you submitted.<sup>2</sup>

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<sup>1</sup>We note that chapter 552 of the Government Code does not require the district to release information that did not exist when it received this request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. *See Gov't Code* § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Section 552.103 of the Government Code, also known as the "litigation exception," provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that the governmental body seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You inform us, and have provided documentation demonstrating, that the district was a party to two pending lawsuits when it received this request for information. You also inform us that the submitted information relates to the pending cases. Based on your representations, the submitted documentation, and our review of the information at issue, we conclude that the district may withhold the submitted information at this time under section 552.103.

In reaching this conclusion, we assume that the opposing parties in the pending litigation have not seen or had access to any of the information that the district seeks to withhold. The purpose of section 552.103 is to enable a governmental body to protect its litigation interests by forcing parties to obtain information that relates to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, if the opposing parties to the pending litigation have seen or had access, through discovery or otherwise, to any of the information at issue, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the district may no longer withhold any of the submitted information under

section 552.103 once the pending litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). As we are able to make this determination, we need not address your other arguments under section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

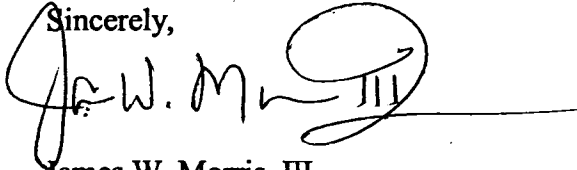
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a long horizontal line extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 192633

Enc: Submitted documents

c: Mr. Stephan B. Rogers  
Henslee Fowler Hepworth & Schwartz LLP  
342 West Woodlawn Avenue, Suite 103  
San Antonio, Texas 78212  
(w/o enclosures)